No. 93-1567

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

A.J. INDUSTRIES, INC.,

Petitioner,

vs.

DEANE and RAYLENE HEDGES and WESTERN AUTO SUPPLY CO., INC.,

Respondents.

On Petition for Writ of Certiorari to the Vermont Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENT WESTERN AUTO SUPPLY CO., INC.

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QUESTION PRESENTED

1. Whether personal jurisdiction over the non-resident manufacturer of an allegedly defective product is proper where the manufacturer has directly employed a national distribution network to market its products in every state, including the forum state.

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STATEMENT OF THE CASE

In 1967, Petitioner's predecessor-in-interest, Armstrong Products Corporation (hereinafter "Armstrong"), a West Virginia corporation, manufactured "Wizard" space heaters. In 1988, in Berlin, Vermont, Respondent Deane Hedges was severely injured when an allegedly defective Wizard heater tipped over, causing an explosion. The heater had been sold by Armstrong to Respondent Western Auto Supply Co. (hereinafter "Western"), a nationwide distributor of home appliances and hardware with retail outlets in every state, including Vermont.[1] The record does not disclose the particular means by which Hedges came into possession of it.

Armstrong and Western had a long-standing contractual relationship in which Western purchased considerable numbers of space heaters and ironing machines, both under Armstrong's "Wizard" label, for national distribution and sale. Armstrong also distributed its various products through other nationwide retailers such as Sears, Roebuck & Company and Montgomery Ward. There were no geographic restrictions on the distribution of any of these products.

Standing in Armstrong's shoes, Petitioner challenged the Vermont court's assertion of personal jurisdiction over it in the products liability action subsequently brought by Hedges. Ultimately, the Vermont Supreme Court ruled that it was proper to exercise personal jurisdiction over Petitioner in Vermont. By directly employing a nationwide distribution network that included Vermont to market its products, the court reasoned, Armstrong had purposely availed itself of Vermont's market, and

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1. Western is a Delaware Corporation, incorporated as a wholly-owned subsidiary of Beneficial Corporation in 1961. In 1985, it was acquired by Wesray Corporation. In 1988 it was acquired by Sears, Roebuck & Company, a New York Corporation, and has been operated as a wholly-owned subsidiary of Sears since that time.

reasonably should have foreseen the possibility of being haled into court there to defend its products. Because the relative burdens on the parties and the interests of the forums decidedly favored Vermont, furthermore, traditional notions of fair play and substantial justice were not offended by the imposition of personal jurisdiction against Petitioner in Vermont. Correctly applying the principles enunciated most recently by this Court in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), the Court held that Petitioner was subject to suit in Vermont. This conclusion is now challenged by Petitioner in its Petition for Writ of Certiorari to this Court.

REASONS FOR DENYING THE WRIT

I.

BECAUSE THE VERMONT SUPREME COURT FOLLOWED THE APPROPRIATE LEGAL PRINCIPLES IN FINDING PERSONAL JURISDICTION OVER PETITIONER, THERE IS NO REASON FOR THIS COURT TO GRANT CERTIORARI.

Petitioner asserts that this Court should grant certiorari in order to correct the Vermont Supreme Court's failure to follow the due process standard for establishing personal jurisdiction set forth in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). The fact that the Vermont court found personal jurisdiction to exist over Petitioner, however, does not mean that it rejected *Asahi*. To the contrary, in asserting jurisdiction the court correctly applied the legal principles laid out by this Court in *Asahi*. There is no reason, therefore, for this Court to grant certiorari.

Asahi is the most recent in a long line of cases that have examined the boundaries of personal jurisdiction under Constitutional due process standards. Prior decisions of this Court

have established that a court seeking to impose personal jurisdiction, consistent with due process, over a non-resident defendant must satisfy a two-prong test: first, the defendant must be shown to have purposefully established "minimum contacts" in the forum state, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), and second, the imposition of jurisdiction must not be accomplished under circumstances that would offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

To establish the requisite "minimum contacts," a non-resident defendant must be shown to have directed some act towards the forum state by which it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475, *quoting Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The contacts must not occur solely because of the unilateral act of an unrelated third party, as by a consumer bringing a product into the forum state after the defendant has, placed it into the "stream of commerce" elsewhere, *World-Wide Volkswagen Corp. v. Woodson*, 445 U.S. 286, 297-298 (1980), but rather must "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475, *quoting McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957) (emphasis in original).

In *Asahi*, the meaning of minimum contacts was explored further. A plurality of justices found that in order to establish the requisite "substantial connection" with the forum state, a non-resident defendant must be shown to have done more than merely place its product into the stream of commerce. 480 U.S. at 112. There must be additional conduct as well by which the defendant's intent or purpose to serve the forum state's market is established, such as advertising or soliciting business there, designing its products for use there, or creating a distribution system to market its products there. *Id.*

No such additional conduct was found in *Asahi*.[2] The non-resident defendant there, an alien corporation, manufactured a component part which was both produced and distributed outside of the forum state, and only made it to the forum state as a result of the distribution network employed by the ultimate manufacturer, also an alien corporation. The component manufacturer did not otherwise solicit business in the forum state or specifically direct any activities there. Under those circumstances, although it may have been foreseeable that the component manufacturer's products ultimately may have been swept into the forum state, its conduct and connection with the forum state were not such that it reasonably should have anticipated being haled into court there. *World-Wide Volkswagen*, 444 U.S. at 297; *see also Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984), cited with approval in *Asahi*, 480 U.S. at 111. Thus, the imposition of personal jurisdiction was deemed improper.

Such is not the case in the current action. Here, Armstrong stands in a dramatically different factual position than did the alien defendant in *Asahi*. In finding jurisdiction over it, the Vermont Supreme Court did not ignore *Asahi*; it correctly interpreted its legal principles and appropriately distinguished its facts. There is no reason, therefore, for this Court to grant certiorari.

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2. *Asahi* was a plurality decision. The Court unanimously held that traditional notions of fair play and substantial justice precluded the exercise of personal jurisdiction over the non-resident defendant regardless of whether sufficient minimum contacts existed with the forum state or not. The Court was divided, however, both as to the appropriate legal standard for measuring minimum contacts and as to whether factually the standard had been met. Of those justices that considered additional conduct to be necessary in order to support a finding of minimum contacts, a majority found none. 480 U.S. at 112-113, 122.

A. Armstrong Directly Created, Controlled and Employed the Distribution Network for Its Products.

One of the factors deemed significant by this Court in determining that there were insufficient minimum contacts to justify the imposition of personal jurisdiction over the non-resident defendant in *Asahi* was the fact that it did not "create, control, or employ the distribution system" that brought its products into the forum state. 480 U.S. at 112. In contrast, in the current case, the non-resident defendant purposefully created and directly employed the distribution system that brought its products into Vermont.

As a component manufacturer, the non-resident defendant in *Asahi* was completely removed from the distribution network that controlled when, where, how and to whom the final product was marketed. 480 U.S. at 112. Unlike the manufacturer of a final product, a component manufacturer cannot realistically exercise control over the final product's ultimate distribution, and therefore cannot eliminate the possibility of being haled into court in an undesirable forum. *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375 (8th Cir. 1990) (no jurisdiction over alien component manufacturer where, for all it knew, end product manufacturer could have installed component at any number of locations, either in the United States or abroad). This fact alone justifies the imposition of a heavier burden upon a court seeking to assert personal jurisdiction against a component manufacturer, as was the case in *Asahi*, than is necessary against the manufacturer of a final product, as is the case here. *See Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 742 F. Supp. 717 (D. Puerto Rico 1990); *Hall v. Zambelli*, 669 F. Supp. 753, 757 (S.D. W. Va. 1987); *Charles Gendler & Co. v. Telecom Equipment Corp.*, 508 A.2d 1127 (N.J. 1986).

But unlike the non-resident defendant in *Asahi*, who did not

directly create, control or even use the distribution network that ultimately carried its product to California, in the present case Armstrong itself had the power to directly control the distribution of its products. *Cf. Boit v. Gar-Tech Products, Inc.*, 967 F.2d 671 (1st Cir. 1992) (no jurisdiction over non-resident defendant where evidence failed to establish whether it directly controlled the distribution network that resulted in the marketing of its product in the forum state); *Madara v. Hall*, 916 F.2d 1510 (7th Cir. 1990) (no jurisdiction over non-resident defendant magazine interviewee who had no control over where magazine containing allegedly libelous statement was distributed); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990). Had Armstrong wanted to avoid the possibility of being haled into court to defend its products in a particular forum, it could have restricted distribution accordingly, by choosing local or regional distributors to market its products in select areas only, rather than using nationally known retailers whose reach extended into every state. *See, e.g., Larose v. Sponco Mfg., Inc.*, 712 F. Supp. 455 (D. N.J. 1989) (no jurisdiction over non-resident local distributor with a constrained foreseeable market); *Andrews University v. Robert Bell Industries, Ltd.*, 685 F. Supp. 1015, 1023 (W.D. Mich. 1988) (no jurisdiction over alien manufacturer who had no marketing or distribution system in the United States); *Smith v. Dainichi Kinzoku Kogyo Ltd.*, 680 F. Supp. 847 (W.D. Tex. 1988) (no jurisdiction over non-resident manufacturer who distributed its product to retailer whose territory did not encompass the forum state).

Armstrong took no such steps to restrict the distribution or sale of its products. *See* Entry Order, Vermont Superior Court, January 13, 1994, Petitioner's Appendix at 2. To the contrary, it purposely directed its products into every state served by its distributors, including Vermont. That it did so by employing independent national distributors — distributors that it in fact chose *because* of their nationwide reach and recognition — does not make its intent to serve every state's market any less apparent,

or its decision to do so any less deliberate. *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993); *Vermeulen v. Renault U.S.A., Inc.*, 975 F.2d 746 (11th Cir. 1992); *Hall v. Zambelli*, 669 F. Supp. 753, 757 (S.D. W.Va. 1987); *Cox v. Hozelock, Ltd.*, 411 S.E. 2d 640, 643 (N.C. App. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 78 (1992); *Charles Gendler & Co. v. Telecom Equipment Co.*, 508 A.2d 1127, 1136 (N.J. 1986). The stream of commerce that carried Armstrong's products into Vermont was neither the result of a consumer's unilateral act, nor random, fortuitous happenstance. It was a journey that Armstrong itself deliberately mapped out for its products, one that it regularly used and from which it profited, and one for which it properly should be made to bear the risks.

B. Armstrong Advertised Its Products and Solicited Business in the Forum State.

The plurality in *Asahi* found that a non-resident defendant who advertises or otherwise solicits business in the forum state demonstrates thereby its intent to serve the forum state's market, such that the imposition of personal jurisdiction becomes proper. 480 U.S. at 112. Unlike the defendant in *Asahi*, the non-resident defendant here both advertised and solicited business in the forum state. Washington County (Vermont) Superior Court, Ruling on Motion to Dismiss for Lack of Personal Jurisdiction, September 10, 1992, Petitioner's Appendix at 10. Once again, therefore, the Vermont Supreme Court correctly applied the legal standard enunciated in *Asahi* to different facts, and thereby reached the only appropriate result.

Although Armstrong's marketing efforts in Vermont may have focused on other Wizard product lines in addition to its space heaters, the name recognition and positive consumer response it hoped to establish thereby would have extended to all of its products, including its heaters. *Vermeulen v. Renault U.S.A., Inc.*, 975 F.2d 746 (11th Cir. 1992); *Decker Coal Co. v. Commonwealth*

Edison Co., 805 F. 2d 834, 840 (9th Cir. 1986) ; *Murante v. Pedro Land, Inc.*, 761 F. Supp. 786 (S.D. Fla. 1991). In any event, whether by way of offering to supply the forum state's residents with ironing machines or space heaters, the consequence of such conduct, purposefully directed as it was towards the forum state's market, was that Armstrong reasonably should have anticipated being haled into court there. *Cf. Andrews University v. Robert Bell Industries, Ltd.*, 685 F. Supp. 1015, 1023 (W.D. Mich. 1988) (no jurisdiction over alien boiler manufacturer whose contacts with the forum involved only three prior sales of similar products, all of which were unsolicited; situation would have been different if it had had "a marketing or distribution system or in some other way promoted its products" in the forum). This is the kind of foreseeability that is critical to the proper exercise of due process. It is *not* the ability to predict that a particular item will find its way into the forum state merely because of some third party's fortuitous act, but rather that the defendant's own purposeful acts will have some effect in the forum state. *Madara v. Hall*, 916 F.2d 1510, 1517 (7th Cir. 1990) (citing *Asahi*); *see also Vermeulen v. Renault U.S.A., Inc.*, 975 F.2d 746, 760 n. 20 (11th Cir. 1992); *Smith v. Dainichi Kinzoku Kogyo Ltd.*, 680 F. Supp. 847 (W.D. Tex. 1988). This is the foreseeability that provides the constitutional touchstone of personal jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 297. It was lacking in *Asahi*, but it is present here.

C. Traditional Notions of Fair Play and Substantial Justice Warrant the Imposition of Personal Jurisdiction.

Although this Court was divided in *Asahi* as to whether sufficient minimum contacts existed with the forum state to justify the imposition of personal jurisdiction, it unanimously held that jurisdiction could not be asserted in any event because to do so would offend "traditional notions of fair play and substantial justice." 480 U.S. at 111-116. Balancing the relevant factors in the present case compels an entirely different result.

In *Asahi*, this Court found that the relative burdens on the parties and the relative interests of the forums mandated against a finding of personal jurisdiction in California. The defendant there was not only a non-resident, but also was an alien. This Court noted the "unique burden placed upon one who must defend oneself in a foreign legal system," and accorded significant weight to this factor. 480 U.S. at 114. Balanced against the minimal interest that the forum state had retained in the lawsuit once the primary litigants had settled out, to have exercised personal jurisdiction would have been unreasonable and unfair. 480 U.S. at 116.

Exactly the opposite result is dictated here. Armstrong is not an alien defendant, and therefore is not being compelled to litigate a foreign dispute in an unfamiliar judicial system. *Cf. Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 376 (8th Cir. 1990). To the contrary, it is being called upon to defend its products in a forum in which it voluntarily chose to market them and with which its familiarity is not questioned. *Benitez-Allende v. Alcan Aluminio Do. Brasil, S.A.*, 857 F.2d 26 (1st Cir. 1988). Under these circumstances, to impose jurisdiction against it in Vermont would not be unduly burdensome.

Vermont has a compelling interest in being able to provide a forum for an injured resident against the out-of-state manufacturer of a defective product. *Charles Gendler & Co. v. Telecom Equipment Corp.*, 508 A.2d 1127, 1139 (N.J. 1986). Judicial economy is promoted by having all persons in the chain of distribution appear in one action to defend against product liability claims, a consideration that, again, favors Vermont as the most appropriate forum. *See Violet v. Picillo*, 613 F. Supp. 1563, 1579 (D.C. R.I. 1985). Given that the accident occurred there, the plaintiffs reside there, and the witnesses are located there, Vermont also represents the most efficient forum for obtaining relief. All of these considerations mandate *in favor of* the exercise of personal jurisdiction over Armstrong in Vermont, not against it.

Indeed, if personal jurisdiction cannot be asserted against Armstrong in Vermont under the circumstances of this case, then presumably the only state where jurisdiction against it would lie would be in West Virginia, its home state. Certainly, considering such factors as judicial economy, the convenience of the parties and the forum's interest in the litigation, traditional notions of fair play and substantial justice would disfavor any other state. Such a result would raise unnecessary barriers for products liability plaintiffs, both financial and otherwise. *Cox v. Hozelock, Ltd.*, 411 S.E. 2d 640, 643 (N.C. App. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 78 (1992). It would be to close one's eyes to the benefits that Armstrong reaped by deliberately employing a national distribution network to market its wares that encompassed rather than excluded Vermont. *Hall v. Zambelli*, 669 F. Supp. 753, 757 (S.D. W. Va. 1987). Such a result would undermine traditional notions of fair play and substantial justice, not enhance them.

Traditional notions of fair play and substantial justice compel the imposition of jurisdiction against Armstrong in Vermont, therefore. This is not one of those "rare cases" in which such concerns defeat the reasonableness of jurisdiction. *Asahi*, 480 U.S. at 116 (Brennan, J., concurring in part and concurring in the judgment). Armstrong has purposefully availed itself of Vermont's market and consequently is answerable for its defective products there. Personal jurisdiction exists against it in Vermont.

Far from ignoring the due process standards for imposing personal jurisdiction on a non-resident defendant laid out by this Court in *Asahi*, therefore, the Vermont Supreme Court in fact properly applied them and appropriately found jurisdiction to exist. That other courts as well have found reason to distinguish *Asahi* signifies no more than that in each case, the decision whether to impose personal jurisdiction necessarily must rest on the particular facts establishing the nature and extent of the non-resident defendant's connection to the forum. *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993);

Abaun v. General Electric Co., 735 F. Supp. 1479 (D. Guam 1990). *Asahi* has not been ignored; it has been assimilated into the body of due process jurisprudence against which each non-resident defendant's conduct must be measured. But different facts compel different conclusions, even though the same legal standards are applied. In the present case, no other conclusion would have been justified, given the legal principles enunciated in *Asahi*. There is no reason, therefore, for this Court's review. The petition for certiorari should be denied.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.[3]

Respectfully submitted,

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3. Western has been authorized to state that Respondents Deane and Raylene Hedges join in its opposition to the Petition for a Writ of Certiorari.